

In The Matter Of:

*YAAKOV LICCI v.
AMERICAN EXPRESS BANK*

March 11, 2009

*CONFERENCE
SOUTHERN DISTRICT REPORTERS
500 PEARL STREET
NEW YORK., NY 10007
212-805-0300*

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AMERICAN EXPRESS BANK

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93bdlicc
[1] UNITED STATES DISTRICT COURT
[2] SOUTHERN DISTRICT OF NEW YORK
[3] -----x
[4] YAAKOV LICCI, et al.,
[5] Plaintiffs, New York, N.Y.
[6] v. 08 Civ 7253 (GBD)
[7] AMERICAN EXPRESS BANK LTD.,
[8] and LEBANESE CANADIAN BANK,
[9] SAL,
[10] Defendants.
[11] -----x
[12] March 11, 2009
[13] 10:08 a.m.
[14] Before:
[15] HON. GEORGE B. DANIELS,
[16] District Judge
[17] APPEARANCES
[18] ROBERT J. TOLCHIN
[19] Attorney for Plaintiffs
[20] MORRISON & FOERSTER LLP
[21] Attorneys for Defendant American Express
[22] BY: MARK P. LADNER
[23] MARK MCPHERSON
[24] DEWEY & LEBOEUF
[25] Attorneys for Defendant Lebanese Canadian Bank
[26] BY: LAWRENCE S. HIRSH
[27] JOSHUA SPRAGUE
[28] THE CLERK: The first case is Yaakov Licci v. American
[29] Express Bank.
[30] Will the parties please state their names for the

[1] background, I don't know if you -- stop me if I am telling you
[2] what you have read already, your Honor. The plaintiffs in this
[3] case are individuals who were victims of terrorist attacks on
[4] a -- specifically rocket attacks by the Hizbollah terrorist
[5] organization in Lebanon, and the gist of the claim is that the
[6] defendants, Lebanese Canadian Bank and American Express Bank,
[7] facilitated wire transfers, financial transactions, with
[8] Hizbollah, thereby enabling Hizbollah to obtain access to
[9] dollars and evade the United States sanctions regime and
[10] international embargoes that are intended to starve them of
[11] cash and diminish their ability to carry out terrorist attacks.

[12] So you have wire transfers that were conducted through
[13] New York, victims who were injured in Israel, and a debate as to
[14] what law to apply to the negligence cause of action.

[15] **THE COURT:** OK. So how do you want to proceed? When
[16] do you want to make the motion?

[17] **MR. TOLCHIN:** Well, they have to make the motion, and
[18] I know what's going to happen is they are going to submit an
[19] affidavit from an Israeli law expert opining that under Israeli
[20] law we don't have a claim or the claim has to be limited, and
[21] we're going to submit an affidavit from an Israeli law expert
[22] saying that we do have a claim and he disagrees with them, and
[23] then somehow or other your Honor has to decide the issue of
[24] Israeli law.

[25] Now, we believe that it would be most helpful, and I

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[1] record, beginning with the plaintiff.
[2] **MR. TOLCHIN:** Good morning, your Honor. Robert
[3] Tolchin for the plaintiff.
[4] **THE COURT:** Good morning, Mr. Tolchin.
[5] **MR. LADNER:** Good morning, your Honor. Mark Ladner,
[6] Morrison Foerster, for the American Express Bank, and I'm here
[7] with my partner, Mark McPherson.
[8] **THE COURT:** Good morning.
[9] **MR. HIRSH:** Lawrence Hirsh, your Honor, from Dewey &
[10] LeBoeuf, for Lebanese Canadian Bank. I am here with my
[11] associate, Joshua Sprague.
[12] **THE COURT:** Good morning.
[13] **MR. HIRSH:** Good morning.
[14] **THE COURT:** Let me start with Mr. Tolchin. What is
[15] the status from your perspective?
[16] **MR. TOLCHIN:** I'm sorry, sir?
[17] **THE COURT:** What do you want to do, Mr. Tolchin? How
[18] do you want to proceed?
[19] **MR. TOLCHIN:** Where we stand right now in this case is
[20] that the amended complaint has been filed. The defendants have
[21] indicated that they are planning to make a motion to dismiss.
[22] One of the grounds that they raise is that they note that they
[23] are going to move to dismiss on has to do with choice of law.
[24] What's interesting about this case is that several
[25] causes of action are based on Israeli law. By way of

[1] don't see a practical way not to do it, to conduct expert
[2] discovery of those experts. In other words, we should have an
[3] opportunity to depose each other's experts, confront them,
[4] cross-examine them, and narrow down the issues so that your
[5] Honor would have really a full record to be able to make a
[6] decision which view of Israeli law to go with.

[7] **THE COURT:** So your position now is that you want to
[8] take the deposition before the motion is filed?

[9] **MR. TOLCHIN:** No, I think it would make sense to file
[10] the motions and then have the depositions. If we wanted to
[11] have the depositions before they file their motion, that would
[12] also be fine. Just at some point there should be depositions
[13] of the experts.

[14] **THE COURT:** Well, even making that judgment from your
[15] perspective, it seems to me it makes sense for you to see the
[16] motion to see what the expert has to say before you figure out
[17] whether or not it is going to be worth your time and effort to
[18] do a deposition. I mean, these are legal experts. These
[19] aren't any other kind who -- I mean, experts that have some
[20] scientific knowledge that we can't understand. So I'm not
[21] quite sure of whether or not you are going to think it is worth
[22] the time, effort or expense to depose an expert who is simply
[23] going to read the same law that you read and give his or her
[24] personal opinions as to whether or not it applies. I'm not
[25] sure what more you think you are going to get out of a

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[1] deposition.

[2] **MR. TOLCHIN:** You know, we're going to have our own
[3] expert and the experts are going to disagree and I think it
[4] would be -- I think --

[5] **THE COURT:** Experts always disagree.

[6] **MR. TOLCHIN:** Of course. But I think it would be
[7] tremendously valuable to question the witness and to ask him,
[8] you know, when you reached this opinion, did you consider this,
[9] did you consider that, what about this case, does that change
[10] your opinion, and narrow it down. And as a result of that
[11] examination, there really may be things that each side's expert
[12] may want to back off of or they may move closer to each other,
[13] but the questioning will make it easier for your Honor.

[14] **THE COURT:** Well, if you want to attempt to work it
[15] out with the other side, if you want to agree to give your
[16] expert's opinions early and exchange the experts' opinions,
[17] then you can make a more informed judgment as to whether or not
[18] some sort of deposition is appropriate, helpful or necessary.
[19] Otherwise I think that, you know, if the two sides can't agree,
[20] the appropriate thing to do is to have them file their motion.
[21] Then you can either make an application and tell me why you
[22] need to take a deposition before you file your response, and if
[23] that's appropriate, then I'll let you take your deposition
[24] before you file your response. But otherwise I think that they
[25] should file their motion, file their affidavit of their expert.

[1] that authority, and if that authority is clear, then, you know,
[2] we can move from there. If that authority is not clear --
[3] obviously, the more persuasive one is the one that is pointing
[4] to some authority rather than a person who is simply giving me
[5] what their particular opinion happens to be and nobody else
[6] seems to have that opinion. So at this point I think it makes
[7] more sense for you to see what the expert has to say. That
[8] seems to be to narrow the issues more than anything else.

[9] So let them file their motion, see what the expert has
[10] to say. If you think that you need to depose the expert for
[11] some reason and the two of you haven't agreed to exchange
[12] expert opinions before the motion is filed and can't agree on
[13] whether or not a deposition should or shouldn't take place, if
[14] you think it should take place then you should make that
[15] application to me before -- after you file the response and
[16] give me a reason why you say that based on your review of the
[17] motion and the expert's opinion, why in your opinion that it is
[18] going to be that important for my decision for me to have some
[19] deposition of the experts before the motion is decided.

[20] At this point I don't even know exactly how the motion
[21] is going to be articulated or how the motion is going to be
[22] formed so it is not possible for me to say that it makes any
[23] sense at this point in time to depose legal experts on Israeli
[24] law, unless the two of you won't agree to expend the time,
[25] effort and expense to do that.

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[1] You can respond by filing your motion and filing your affidavit
[2] with your expert. If necessary, you can bring your experts in
[3] here or have a deposition or have a hearing on the experts, if
[4] you think that that's what's going to be helpful to me.

[5] But the question is, as I say, when you say "helpful,"
[6] the question is whether it is helpful to the lawyers or it is
[7] helpful to me to make a decision, and I'm really interested in
[8] what is going to be helpful to me to make a decision. In most
[9] cases, I have rarely seen a particular need to depose the
[10] experts when the experts are simply arguing whether certain law
[11] applies. Quite frankly, if they can't point me to something
[12] that will convince me on paper that their position is correct,
[13] it's rare that something they have to say based on their
[14] testimony under oath is going to be particularly illustrative
[15] to decide that issue for me.

[16] I don't care how firmly they believe it or how
[17] credible they sound, you know, I want to know what law they are
[18] basing it on and what references they are making for me to make
[19] that interpretation. And if that interpretation is simply
[20] their opinion and no one else has stated that opinion
[21] officially, then it's going to not have very much weight,
[22] whether it is your expert or their expert.

[23] So I would suggest, first, that if either one of your
[24] experts can point to some authority that clearly would indicate
[25] that a particular law would apply, then you should point to

[1] **MR. TOLCHIN:** Judge, what I think would actually make
[2] the most sense would be to, if we do the depositions, to do
[3] them after each side has put in their expert affidavit. In
[4] other words, my expert has his opinion. Their expert has his
[5] opinion. Each side will put in affidavits. I can guarantee
[6] you, in advance, that you are going to have two experts, each
[7] citing authorities and each claiming to be right.

[8] **THE COURT:** I will bet money on that, too.

[9] **MR. TOLCHIN:** And I would bet money on the
[10] conclusion -- I'm saying that it's not a position that I would
[11] envy your Honor to be in because, you know, we didn't go to law
[12] school in Israel, we can't -- it's difficult to do original
[13] research. The source material is in a foreign language. It is
[14] coming from a completely different legal system --

[15] **THE COURT:** I've done it before and I've done it on
[16] Israeli law before, and, quite frankly, it is not much
[17] different than doing it on New Jersey law; the principles are
[18] basically the same.

[19] You can cite me some authority and how the law is
[20] going to apply. If you think this is a unique situation that
[21] has never come up before, then your experts aren't as much use
[22] to me as they are if they can show me clearly and logically and
[23] reasonably why certain law applies and why certain law doesn't
[24] apply.

[25] If you want to exchange expert reports, the two of you

[1] should consider doing that. Otherwise it is going to be their
[2] responsibility to give you their expert report prior to you
[3] giving them your expert report because they've got to make the
[4] motion and they've got to attach the affidavits and the support
[5] for their motion. So I assume you're going to get it either
[6] simultaneously if you want to exchange it with them
[7] simultaneously or you are going to get it first if they are
[8] going to have to make the motion based on their expert and
[9] their expert's opinion and their expert's report.

[10] **MR. TOLCHIN:** So just mechanically -- obviously, we'll
[11] proceed whatever way your Honor thinks is the most useful.
[12] Just procedurally, they're going to file their motion. We'll
[13] get our expert report. If we think that at that point that
[14] depositions would be helpful, mechanically how should we raise
[15] that with your Honor?

[16] **THE COURT:** Then you should send me a letter
[17] application saying you need a deposition of this expert before
[18] you can respond, and you should articulate in that letter why
[19] you say based on the papers you have received that you would
[20] need such a deposition. And if I think a deposition is
[21] appropriate, I will give it to you.

[22] But, you know, it's got to be more than just the
[23] argument you make now in the abstract that, you know, you would
[24] like to put some tough questions to the experts before they
[25] respond, and you've got to tell me, given the nature of the

[1] **THE COURT:** Well, so --

[2] **MR. TOLCHIN:** If it is before the motion is made or
[3] after the motion or after the motion and after we serve our
[4] expert report --

[5] **THE COURT:** What I'm most comfortable with at this
[6] point is for you to get the motion, the expert report. Look at
[7] it in context, and then make an informed judgment of whether or
[8] not your expert and your response can dispatch their motion
[9] without any further depositions, or whether or not you think
[10] you need a deposition to fight this motion.

[11] If you think you need a deposition to fight the
[12] motion, you know, you should tell me why. If you think you can
[13] win without it, then I suggest you just go ahead and respond to
[14] it. That would be my suggestion.

[15] **MR. TOLCHIN:** So we'll proceed that way, Judge.

[16] **THE COURT:** Yes, sir.

[17] **MR. LADNER:** Your Honor, Mark Ladner for American
[18] Express Bank.

[19] I just want to make it clear. Our position is we
[20] don't have to decide Israeli law. We're making a motion to
[21] dismiss the plaintiff's cause of action against -- it is a
[22] negligence cause of action against American Express Bank. They
[23] allege to be sounding in Israeli law.

[24] American Express Bank is a New York institution. We
[25] have a respondent bank relationship with the Lebanese Canadian

[1] motion and given nature of the issue and given the nature of
[2] the opinion and the nature of your expert's opinion, why the
[3] limited dispute among the experts on the issue requires
[4] depositions as opposed to my simple review of whether or not
[5] either expert has submitted any reasonable support for their
[6] opinions. And if their expert hasn't submitted reasonable
[7] support for their opinion or your expert demonstrates to me --
[8] points out to me why it is wrong, then I don't think I need a
[9] deposition, I think I can deny the motion.

[10] You have to make that informed judgment when you see
[11] the papers, or if you want to exchange expert reports before
[12] then, you can make that judgment and make that application.
[13] Unless you want to proceed a different way. Whatever way you
[14] want to proceed.

[15] **MR. TOLCHIN:** Ultimately, Judge, you are the one we
[16] have to convince.

[17] **THE COURT:** Ultimately, you are the one that has to do
[18] the convincing, so I want to first give you an opportunity to
[19] do it the way you want to do it, the way you think is going to
[20] be most persuasive.

[21] **MR. TOLCHIN:** I just think to make the fullest
[22] arguments, to really have a robust record and put before the
[23] Court everything that can possibly assist the Court and have a
[24] complete record, at some point in the process the experts
[25] should be deposed and --

[1] Bank. According to the plaintiffs, Lebanese Canadian Bank had
[2] a relationship with another organization which the plaintiffs
[3] allege to be a front for Hizbollah and that Hizbollah had a
[4] rocket attack that injured and killed some of Mr. Tolchin's
[5] clients.

[6] We think it is very clear that New York law applies.
[7] New York law is going to apply here. So you don't have to
[8] reach the Israeli law issue.

[9] We did in our original motion to dismiss the original
[10] complaint, we attached an Israeli law opinion but only to show
[11] that Israeli law is not different than New York law on the
[12] issue of negligence. I think, as your Honor is aware, New York
[13] law is pretty clear that a bank doesn't owe a duty to a
[14] noncustomer, particularly to a customer of -- a noncustomer of
[15] a customer. So it is a situation where we think it is going to
[16] be relatively clear that New York law applies.

[17] Just because the plaintiffs allege that Israeli law
[18] applies, we're going to put in an Israeli law affidavit, but we
[19] don't think you ever have to reach that issue. The threshold
[20] determination for the Court is what law applies, and we think
[21] under New York interest principles, New York has a paramount
[22] and predominant interest in applying its law to the allegations
[23] here.

[24] **THE COURT:** Well, why don't you do this. Why don't
[25] you go ahead and file your motion first, as I say. That

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[1] particular issue may end up not being of significance or being
[2] moot. Why don't you go ahead and agree upon a schedule, a
[3] motion schedule.

[4] What I am going to do is I will put -- in the proposed
[5] case management plan, I had a conference on for April 8th. I
[6] think we should skip that conference and leave the conference
[7] on for June 17th. June 17th, hopefully I will have a fully
[8] submitted set of the motion papers, had an opportunity to
[9] review it, and I'll hear you, if you want to be heard further
[10] on oral argument, on June the 17th.

[11] **MR. LADNER:** Your Honor, we have a stipulation that
[12] has been so ordered by the Court which I think puts out the
[13] briefing on the motion until about July 1st.

[14] **MR. TOLCHIN:** It is April 17th.

[15] **MR. LADNER:** Our motion is due April 17th. Then the
[16] plaintiffs have 45 days to respond, and the defendants have 30
[17] days for their reply. So it is fully submitted by July 1st.

[18] **THE COURT:** You say it is going to be fully submitted
[19] by July 1st?

[20] **MR. LADNER:** July 1st.

[21] **THE COURT:** Well, then, let's say July the -- let's do
[22] it the week after Independence Day. So let's say July the 7th;
[23] Tuesday, July 7, at 10:30.

[24] **MR. LADNER:** Thank you, your Honor.

[25] **THE COURT:** OK. And I'll hear from the parties at

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[1] that time.

[2] If I have to resolve any of these issues before then,
[3] then just give me a letter and a quick response, and I will
[4] resolve it right away. But otherwise I will assume that I will
[5] have a fully submitted motion by July 1st and will have had an
[6] opportunity to review all of the papers and if I want to hear
[7] you further, it will be on July 7th.

[8] Is there anything else we need to address?

[9] **MR. TOLCHIN:** Just to clarify about the deposition
[10] issue, once we get their motion we can write to you and flesh
[11] that out?

[12] **THE COURT:** Yes.

[13] **MR. LADNER:** Thank you, your Honor.

[14] **THE COURT:** All right. Then I will see you
[15] July 7th unless I hear from you earlier.

[16] **MR. TOLCHIN:** Thank you, Judge.

[17] **THE COURT:** You are welcome.

[18] - - -

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